IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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In the Circuit Court of Appeals, the appellant filed his brief, together with a statement of jurisdiction on appeal, which was printed as a separate document and copies of which have been furnished to this court. Commencing on page 7 of the Jurisdictional Statement, to and including page 22, under the heading "C," the appellant presents forty-one questions raised by the appeal 79

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit has not yet been reported. It is contained in the record. [R. 805.] There was no opinion in the District Court.

Statement of the Case.

Reference is made to the Summary and Short Statement of the case in the petition.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 347, United States Codes. The Circuit Court of Appeals affirmed Counts IV and V June 4, 1945. Appellant duly and regularly petitioned for rehearing, which was denied by the court September 13, 1945. [R. 809.]

Statutes Involved.

Title 18, Section 80 (presenting false claims). The Fourth and Fifth Amendments to the U. S. Constitution; Title 18, Sections 611-616, regarding search warrants; U. S. Code; Title 50, Section 643 (First War Powers Act), and the President's Executive Order 9127; Title 28, Section 411, U. S. Codes, regarding selection of jurors according to state practice; Code of Civil Procedure of California, Section 204.

Specification of Errors.

The Court is respectfully referred to that part of the petition which sets forth the questions presented, and to that part which sets forth the reasons for the allowance of the writ. We set forth as specification of errors each of the matters therein set forth and as set forth in our assignment of errors in the record [R. 754-773] and the additional errors of procedure in the Circuit Court of Appeal.

SPECIFICATION OF ERRORS AND SUMMARY OF ARGUMENT.

I.

The evidence should have been suppressed as having been both searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

A. The search and seizure were initially unlawful.

B. The affidavits for the search warrant were entirely insufficient under any circumstances.

C. The affidavit for the search warrants were based upon the initially unlawful search.

D. The illegal seizure was for the purpose of securing evidence in the case.

E. The trial court erred in not suppressing the evidence upon these facts.

F. No search warrant was ever sought or secured for the check for $4,000, but it was taken without any legal or lawful process.

G. The court erred in not taking oral testimony on the motion to suppress.

H. The court erred in not considering the offer of proof of evidence illegally searched and seized.

I. The Court erred in the trial of the cases in not striking the evidence illegally secured.

J. The court erred in not permitting the defendant to call FBI Agent Myerson to testify during the trial as to the manner of getting the evidence, and then overruling the offer of proof as to what that would show.

K. The court erred in not striking all the illegally secured evidence.

L. The trial court erred in receiving the books and records, volumes 34 to 45, in evidence over objections as to their unlawful search and seizure.

M. The trial court erred in not granting a new trial and in not arresting judgment where there had been an unlawful search and seizure in violation of the Fourth and Fifth Amendments. (Assignments of Error Nos. 12, 13, 15, 16, 17, 22, 23, 24.)

II.

Where Congress has by statute declared that certain agencies of the Government as designated by the president of the United States may inspect the books and records of war contractors, other agencies not so designated may not inspect the records or seize them for any purpose whatsoever and may not seize them without a proper search warrant or even with a proper search warrant, as the safety and secrecy of the matters involved require this construction.

III.

The District Court erred in not sustaining the Demurrer to the Indictment on the ground that it violated the Sixth Amendment to the U. S. Constitution, where, in Count IV, the alleged claim was not set forth and in Count V the alleged material fact concealed or false or fraudulent statement was not set forth, and thus is fails to inform the accused of the nature and cause of the accusation. [Assignment of Errors 1, 2, 3, 4, 6, 7, 10, 11, R. 755, 756.]

IV.

The District Court erred in denying a bill of particulars. [Assignment of Errors 8, R. 756.]

V.

The District Court erred in overruling the plea in abatement and the objection to the jury being composed entirely of men. [Assignment of Errors 9, R. 756.]

VI.

The District Court erred in refusing to order the return to the defendant of the papers and documents which Commander Smith had in his custody so that he could prepare his defense. [Assignment of Errors 19, R. 758.]

VII.

The District Court erred in its procedure relative to the discharge of Juror No. 2, and in holding the hearing outside of the hearing of the defendant and in excusing said juror without the defendant's consent. [Assignment of Errors 21, R. 758.]

VIII.

The trial court erred in failing to direct the Verdict in this case. [Assignment of Error 26.]

IX.

The exoneration of defendant Scott entitled Zap to a directed verdict also.

X.

The court erred in altering the indictment by his instructions!

XI.

The court below failed to instruct the jury on the statute and law applicable to the case and the decision of this court is therefore implicitly in conflict with the case of Corson v. U. S., 147 Fed. (2d) 439, and with Screws v. U. S. (1945), 89 L. Ed. 1029.

XII.

The District Court erred in instructions given and refused.

XIII.

The trial court erred in refusing to arrest judgment.

XIV.

In the Circuit Court of Appeals the appellant filed his brief, together with a statement of jurisdiction on appeal, which was printed as a separate document and copies of which have been furnished to this court. Commencing on page 7 of the jurisdictional statement, to and including page 22, under the heading "C," the appellant presents forty-one questions raised by the appeal.

XV.

The Circuit Court erred in not remanding the case for the taking of testimony and hearing on a motion for a new trial because of a forgery of a document presented in evidence against petitioner.

ARGUMENT.

I.

The Evidence Should Have Been Suppressed as Having Been Both Searched and Seized in Violation of the Fourth and Fifth Amendments to the Constitution of the United States. [Assignments of Error 12, 13, 15, 16, 17, 22, 23, 24, R. 756-758.]

The record shows the following factual situation with reference to the search warrant.

On November 5, 1942, Murray B. Myerson asked Ethel Boyle, a bookkeeper in the office of Mr. Zap, to give him the check for $4,000 on Zap's personal account in which she had subsequently and without Zap's knowledge typed in the name of William H. McAvoy and had also deposited it in the bank, without the knowledge of Mr. Zap. Myerson seized the check without any search warrant or other legal process, and it later became Government's Exhibit 7 in evidence after timely motions before trial to suppress the same were denied, and subsequent motions to strike and to suppress were denied. [Exceptions noted, R. 204, 243, 380.]

From October 20 until December 1, 1942, FBI agents Murray B. Myerson and James C. Sloan daily searched said premises at 1005 Broxton Avenue, without any search warrant, going through books, papers, and records. [See affidavits of Ethel Boyle, R. 154; Estelle Zap, R. 157, and Edward F. Zap, R. 146.]

Myerson, in his affidavit of Dec. 1, 1942, for a search warrant to search the premises at 1005 Broxton Avenue, however, as his basis for the search, averred "that this affidavit is made for the purpose of securing a warrant for the search of the premises known and described as fol-

lows: The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers, and located at 1005 Broxton Avenue, Westwood Village, California; *that affiant was on the above premises by reason of a previous search warrant and observed the hereinafter described books and documents.*" [R. 178.] (Italics ours.) The United States Commissioner acted on this affidavit. [R. 177-179.]

The documents described in the application of December 1, 1942, are listed on page 178 of the record. They do not include the $4,000 check which forms the basis of the convictions on Counts IV and V. They do include books and records introduced over objections on all counts. There is nothing in the application for a search warrant to show probable cause for suspecting there had been a violation of Sections 80 or 83, Title 18, U. S. C., nor that the documents sought were instrumentalities of a crime.

The District Court erred in refusing to suppress the evidence upon the timely motions upon the following grounds:

1. There was an illegal search of the premises which admittedly commenced on October 20, 1942, before the issuance of any search warrants of any kind or character.

2. There was no denial of illegal seizure of the $4,000 check seized on November 5, 1942, without a search warrant of any kind or character.

3. The search of the premises was illegal from October 20th until December 1st when there was no warrant of any kind for the search for the things which were subsequently taken as a result of this search.

4. The affidavit upon which the search of 1005 Broxton Avenue was based was insufficient. It failed to set forth any facts justifying either a search or a seizure, and it failed to set forth any reasonable or probable cause. Therefore both the affidavit and the search warrant of December 1, 1942, were illegal.

5. The officers made the seizure of Exhibit 7 without any search warrant.

6. The officers swore that they made the seizures of December 1, 1942, upon the basis of the purported search warrant of that date based upon alleged observations during their search upon the previous warrant.

The case should therefore be reversed because of use of evidence unlawfully both *searched* and *seized* in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The errors under this heading will be divided and treated under the following subheads:

A. The search and seizure were initially unlawful.

B. The affidavits for the search warrant were entirely insufficient under any circumstances.

C. The affidavit for the search warrants were based upon the initially unlawful search.

D. The illegal seizure was for the purpose of securing evidence in the case.

E. The trial court erred in not suppressing the evidence upon these facts.

F. No search warrant was ever sought or secured for the check for $4,000, but it was taken without any legal or lawful process.

G. The court erred in not taking oral testimony on the motion to suppress.

H. The court erred in not considering the offer of proof of evidence illegally searched and seized.

I. The court erred in the trial of the cases in not striking the evidence illegally secured.

J. The court erred in not permitting the defendant to call FBI Agent Myerson to testify during the trial as to the manner of getting the evidence, and then overruling the offer of proof as to what that would show.

K. The court erred in not striking all the illegally secured evidence.

L. The trial court erred in receiving the books and records, volumes 34 to 45, in evidence over objections as to their unlawful search and seizure.

M. The trial court erred in not granting a new trial and in not arresting judgment where there had been an unlawful search and seizure in violation of the Fourth and Fifth Amendments.

Besides the search warrant issued October 31, 1942, directing a search of the premises at 1005 Broxton Street, there was a search warrant issued December 1, of the same year, directing a search of the same premises. The warrant of October 31, however, directed a search only for certain checks and stubs later suppressed while that of December 1st directed a search for all of the papers, books and documents we have mentioned in the discussion of this subject.

The latter search warrant of December 1, 1942, therefore is the one relied upon to justify the seizure of these

papers. If it was insufficient or if the affidavit upon which it was based was insufficient then the timely motion to suppress should have been granted; the books and documents seized were used as evidence by the Government and a conviction followed their use over timely and repeated objections. This affidavit follows:

> "That this affidavit is made for the purpose of securing a warrant for the search of the premises known and described as follows:
>
> > The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers and located at 1005 Broxton Avenue, Westwood Village, Los Angeles, California. That affiant was on the above premises by reason of a previous search warrant and observed the hereinafter described books and documents.
>
> That, by reason of the above facts, affiant says that at the above described premises, there is now unlawfully possessed and kept the following described property, articles and things:" [Listings, ledgers, transfer sheets, etc.]

The search warrant of December 1, 1942, is based upon the affidavit of Myerson alone. We challenge the Government to point to a single fact alleged in that affidavit from which it can be ascertained that there was probable cause (see Fourth Amendment and Title 18, Section 613). The only allegation remotely tending to justify the issuance of the warrant is that "by reason of the above facts there is now unlawfully possessed and kept the following described property, articles and things." (See *Agnello v. U. S.*, 70 L. Ed. 145; *Grau v. U. S.*, 77 L. Ed. 212.)

That this is a mere legal conclusion is most evident. No doubt Mr. Myerson thought it was unlawful for appellant to possess anything which the affiant regarded as suspicious. Indeed the "unlawfulness" of the possession is cast in the form of a conclusion drawn from "the above facts." But what facts? There is not a single one in the affidavit inconsistent with the innocence both of the possession and the things possessed. Myerson might with perfect safety make similar allegations as to every dollar on deposit in any bank or any merchandise on the shelves of any store. Here is not even the shadow of probable cause nor the ghost of safety from harsh, oppressive and tyrannical invasion of privacy and seizure of property.

The warrant recites that "by reason of violations of 18 U. S. C. A. 80 and 83 a search warrant is desired," etc., but there is not a word in the affidavit from which it can be inferred that any such violation had occurred much less that these books and papers had been used in the violation.

Moreover the warrant itself shows on its very face that its purpose was to seize the described personal property for the purpose of using it as evidence against appellant—the very thing the Supreme Court in the *Gouled* case said could not be done.

But we need not argue the insufficiency of the warrant for the insufficiency of the affidavit is apparent upon a mere inspection.

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury and would lead a man of prudence to believe that the offense had been committed."
>
> *Grau v. U. S.*, 77 L. Ed. 212-214.

Measured by this standard the affidavit in support of this search warrant under which the papers were seized was clearly insufficient. The motion for their return and to suppress them should have been granted. For this errer, even if there were no other, there must be a reversal.

In *United States v. Reily*, 78 L. Ed. 159, the court said:

> "The search warrant was void as it was issued on an affidavit which contained no facts on which to base a finding of probable cause.
>
> "*Re* Rule of Court (C. C.), 3 Woods 502, Fed. Cas. No. 12,126; United States v. Lefkowitz, 285 U. S. 452, 464, 76 L. ed. 877, 882, 52 S. Ct. 420, 82 A. L. R. 775; Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, 34 S. Ct. 341, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Byars v. United States, 273 U. S. 28, 29, 71 L. ed. 520, 522, 47 S. Ct. 248; Giles v. United States (C. C. A. 1st), 284 Fed. 214; United States v. Harnich (D. C.), 289 Fed. 256; Veeder v. United States (C. C. A. 7th), 252 Fed. 414; Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. ed. 374, 51 S. Ct. 153.
>
> "An affidavit under the Tariff Act must contain more than an affirmation of suspicion.
>
> "United States v. Federal Mail Order Corp (C. C. A. 2d), 47 F. (2d) 164; *Re* Chin K. Shue (D. C.), 199 Fed. 282; Pappas v. Lufkin (D. C.), 17 F. (2d) 988; United States v. Clark (D. C.), 18 F. (2d) 442."

A search cannot be made on mere suspicion, and cannot take place where there is not probable cause.

United States v. O'Connell, 43 Fed. (2d) 1005. The court there said:

> "No basis for the belief as set up. Certainly a statement of an official that a person was known to him as a bootlegger could not be received in any court as a statement of fact upon which a judicial declaration might be made."

See, also:

Brown v. United States, 4 Fed. (2d) 246.

In *Nathanson v. United States*, 290 U. S. 41, 78 L. Ed. 159:

> "The search warrant was void as it was issued on an affidavit which contained no facts on which to base a finding of probable cause." (78 L. Ed. 159.)

See, also:

Korler v. U. S., 9 F. (2d) 23;
Dandrea v. U. S., 7 F. (2d) 861;
Salaka v. U. S., 286 F. 125;
Giles v. U. S., 284 F. 208;
Lochnane v. U. S., 2 F. (2d) 427;
In re No. 191 Front St., 5 F. (2d) 282;
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U. S. v. Casuns, 286 F. 976;
Tynan v. U. S., 297 F. 179;
Woods v. U. S., 279 F. 706.

This affidavit was equally void in forming the basis of any search or seizure.

The affidavit of Champlin, which formed the basis of the alleged search and seizure, was dated October 31st, 1942. [R. 187, 188.] The document does not describe any books, papers or records which it is intended to have seized. It is based on hearsay and conclusions of the affiant. There is nothing in this affidavit that relates to any books, papers or records and nothing with relation to any check of the Edward F. Zap Aeronautical Engineers for $4,000. There is no showing of reasonable or probable cause of any false or fraudulent claim. There is no allegation of probable cause to believe or suspect that such a crime had been or was being committed or that there were any papers or documents that were *instrumentalities of a crime.* The affidavit, therefore, was entirely insufficient to furnish the basis of a search or seizure of any books, papers or records.

Gouled v. United States, 65 L. Ed. 647.

There was a search warrant issued October 31, 1942, directing the search of the premises at 1005 Broxton Street. We think the affidavit of Harry Champlin, upon which it was based, is clearly insufficient to support it.

Gouled v. U. S., 65 L. Ed. 647;
Amos v. U. S., 65 L. Ed. 654;
Dandrea v U. S., 7 F. (2d) 861;
Taylor v. U. S., 286 U. S. 1;
Amos v. U. S., 65 L. Ed. 654.

That grave error was committed in denying appellant's motion to suppress and return as evidence papers and documents seized from the residence and place of business of appellant does not seem to admit of the slightest doubt. In our view of this matter it is decisive of this appeal.

Appellant's Notice of Motion to suppress was verified March 4, 1943. [R. 127, 128.] His motion to suppress was sworn to upon the same date. [R. 128, 133.] He alleges that the papers, books and documents were first removed without a search warrant [R. 131]. Confining ourselves for the present to the search of the place of business, he presents the affidavit of Ethel Boyle [R. 151], from which it appears that the books, papers and documents for which Myerson applied and which as we have shown, he described only in vague, general terms could not have been sufficiently identified even for that meager description except upon a search covering a long period of time. The affidavit of Edward F. Zap as to what Myerson and Sloane did, and said in his presence, is undenied. [R. 146-8.]

This first search at 1005 Broxton Avenue was itself, therefore, illegal. It was without probable cause. It did not specify the thing to be seized. It resulted from a search illegal from the beginning.

It is thus evident that the second search was, according to Myerson's own affidavit, based on observations during the first purported search which was in itself illegal.

The Government cannot enter into a premise on an exploratory search and thereafter by reason of a search not based upon a proper affidavit thereby gain information and use it as a basis of another search warrant and thus legalize its first illegal act.

Silverthorne Lumber Co. v. United States, 64 L. Ed. 319;

Gouled v. United States, 65 L. Ed. 647;

Olmstead v. United States, 277 U. S. 438, 72 L. Ed. 944;

Byers v. United States, 71 L. Ed. 520;
Amos v. United States, 65 L. Ed. 654;
Agnello v. United States, 70 L. Ed. 145;
Weeks v. United States, 58 L. Ed. 52;
Goldman v. United States, 86 L. Ed. 1322;
Boyd v. United States, 29 L. Ed. 752.

The court therefore erred in permitting the use of the books, papers and records which were generally searched prior to December 1st, 1942, without any search warrant or other lawful process and which were seized on December 1st, 1942, pursuant to the alleged process based upon the illegal search which the officer admitted having conducted prior to December 1st, 1942.

This is distinctly pointed out in *Boyd v. United States*, 29 L. Ed. 746, and followed with approval by this court (Ninth Circuit) in *Takahashi v. United States*, 143 Fed. (2d) 118.

In the *Takahashi* case this court distinctly pointed out the difference between prohibited searches and seizures and pointed out that the Constitution forbids both *searches* and *seizures*.

It is evident that the Government relied on its search warrant at the time of the proceedings but that that search warrant was distinctly based on the illegal search which the officer admitted he made with a search warrant to cover the matters under search.

C.

But there is a second reason why this evidence should have been suppressed by the court below. It was evident that the search was made not to get instrumentalities of

crime but for the purpose of gathering evidence and this has never been permitted.

Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746;

Gouled v. United States, 65 L. Ed. 647;

Byers v. United States, 71 L. Ed. 520;

Amos v. United States, 65 L. Ed. 654;

Agnello v. United States, 70 L. Ed. 145.

D.

The District Court should have suppressed the check for $4000 both prior to the trial and during the trial.

The check for $4000 illegally seized was Exhibit 7. It was a check that had been signed in blank by McAvoy and Zap and later made out by Miss Ethel Boyle and deposited in the bank. It was a check of Edward F. Zap not on the business but on the separate personal account and was never submitted to the Navy.

It formed the basis of the conviction of Counts IV and V in the indictment.

The method by which this check was obtained was as follows: Ethel Boyle, the bookkeeper, stated in her affidavit as follows: That some time on or about November 5th, 1942, Murray Myerson came to her and said he wanted a check for $4000 which was made out to W. H. McAvoy. At that time he had no search warrant for the same and did not display any. That she showed where the check was in the file and he asked for it and she gave it to him. [R. 155.] Myerson then took it and it was later seen in the Government files by Zap and was produced in court at the time of trial.

This was an illegal search and seizure on November 5th. Nowhere is it claimed that Myerson or anyone had a search warrant for this check or that he ever received a search warrant to seize this check on November 5th, 1942.

The defendant therefore was entitled to a specific suppression of this evidence at the time he made his motion on March 15th, 1942, before Hon. Leon Yankwich, Judge of the District Court, where the motion was denied and exception was allowed.

Weeks v. United States, 58 L. Ed. 52;
Gouled v. United States, 65 L. Ed. 647;
Boyd v. United States, 29 L. Ed. 752;
Amos v. United States, 65 L. Ed. 654;
Agnello v. United States, 70 L. Ed. 145;
Goldman v. United States, 86 L. Ed. 1322.

E.

The District Court erred in failing to allow the taking of oral testimony of Murray Myerson regarding this check.

At the time of the hearing on the motion for the suppression and return of the evidence the notice of motion was that the defendant would move to suppress all the evidence illegally searched or seized or taken, the said motion being based upon the ground that the affidavit forming the basis of the search was illegal; that it was based upon an insufficient affidavit of Harry Champlin and that the search warrant itself was therefore void [R. 130, 131]; that papers, records, documents and files located in the office of E. F. Zap at 1005 Broxton Avenue were removed without a warrant or legal authority in

violation of the constitution of the United States [R. 131]; that they were photostated; that there was no legal authority to make either the search or the subsequent search and seizure, that of December 1st [R. 132];

That the notice of motion provided that it would be based upon all the records and the files in the case and upon the affidavit of E. F. Zap, *"and upon any testimony to be produced orally at said time and place."* (Italics ours.) [R. 135.]

At the time of the oral hearing Special Agent Murray Myerson was in court and the defendant's counsel wanted to call him to the witness stand as well as other witnesses. The District Court refused the request and allowed an exception. [R. 34, 236, 369.]

At that time the defendant stated that it was not possible for defendant to get an affidavit from an FBI investigator who was hostile to the defendant and that his only power to produce the testimony was to call him, but the court refused the request. Thereupon at the time of filing of other affidavits the defendant made an offer of proof of what Murray Myerson would testify to if called as a witness.

The offer of proof was stricken from the files on objections of the Government. It was filed five days after the oral hearing, at the time of filing additional affidavits. The Government objected that there was no provision for the taking of oral evidence at the hearing date set for March 15, 1943, and that no arrangements had been made prior to March 15 for the taking of oral evidence and that the court denied the right to take oral evidence. [R. 168.]

Again during the trial the defendant sought to call Myerson and Sloane. The request was denied. Objections to offer of proof was sustained upon Government objections. [R. 371-380.] **The rulings were erroneous.** There are three ways of producing testimony in court. One is by the oral testimony of the witnesses, the other is by affidavit and third by deposition.

When a witness is in court and is a witness whom a party desires to call in the furtherance of his cause the widest latitude should be allowed so that not only the court but the parties may have the benefit of examination, cross-examination and of observance of the witnesses.

In the present case Murray Myerson was a Government agent whose testimony could only be secured by putting him on the witness stand and we submit it was error to deny the movant that right on his motion to suppress the evidence made timely prior to trial.

Title 28, Section 635, U. S. Codes, provides as follows:

> "Proof in common-law actions. The mode of proof in the trial of actions at common law shall be *by oral testimony and examination of witnesses in open court*, except as hereinafter provided." (Italics ours.)

The taking of evidence by deposition and affidavit is also provided in succeeding sections of Title 28. However, the right to take testimony orally is guaranteed by Section 635 of Title 28, and the refusal of the court to permit the taking of oral testimony, as provided by that section, was a denial of a fundamental right. The situation in this case was that of the presence of a witness whose affidavit could not be obtained. He was present in court and the Government put him on with reference to

other matters in which it was interested, namely, to the excusing of a juror.

It certainly was the right of the defense to call him with reference to the important constitutional right of suppression of the evidence. The denial of that right requires a reversal of the judgment.

In *McNabb v. United States*, 87 L. Ed. 819, 827, the court said:

> "But where in the course of a criminal trial in the Federal courts it appears that evidence has been obtained in such violation of legal rights as this case discloses, it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing, as was done here, to determine whether such motion should be granted, or denied. *Cf.* Gouled v. United States, 255 U. S. 298, 312, 313, 65 L. ed. 647, 654, 41 S. Ct. 261; Amos v. United States, 255 U. S. 313, 65 L. ed. 654, 41 S. Ct. 266; Nardone v. United States, 308 U. S. 338, 341, 342, 84 L. ed. 307, 311, 312, 60 S. Ct. 266."

F.

Again during the trial of the case the defendant renewed his motion to suppress the evidence and asked leave to call Myerson to the witness stand. The trial court, holding that Judge Yankwich had ruled on the matter, denied the motion. This was prejudicial error.

Gouled v. U. S., 65 L. Ed. 647;

McNabb v. U. S., 87 L. Ed. 819, 827;

Olmstead v. U. S., 277 U. S. 438;

U. S. v. Mattingly, 285 F. 922;
U. S. v. Fenton, 268 F. 221;
U. S. v. O'Dowd, 273 F. 600;
Pan Zech v. U. S., 285 F. 871.

A defendant who challenges a denial of his constitutional right may not only do so prior to trial but during the trial and the court is duty bound to consider the motions at either stage of the case and to consider all testimony relating thereto.

Weeks v. United States, 58 L. Ed. 52;
McNabb v. United States, 87 L. Ed. 579;
Takahashi v. United States, 143 Fed. (2d) 118;
Gouled v. United States, 65 L. Ed. 647;
Carroll v. United States, 69 L. Ed. 543;
Amos v. United States, 65 L. Ed. 654;
Byers v. United States, 71 L. Ed. 520;
Agnello v. United States, 70 L. Ed. 145.

G.

The trial court by the same reasoning erred in refusing to strike the evidence of the $4000 check on motion to strike. This motion to suppress the evidence had been timely made before the trial and it was made again on a motion to strike. This has been held to be proper proceeding.

Weeks v. United States, 58 L. Ed. 52;
Byers v. United States, 71 L. Ed. 520;
Agnello v. United States, 70 L. Ed. 145;
McNabb v. U. S., 87 L. Ed. 819, 827, and cases cited under F, *supra*.

H.

The District Court erred also in admitting in evidence over objections the Government's Exhibits 32 to 45. These documents, as to which the court had prior to trial denied a motion to suppress were admitted over objections of defendant that they were illegally searched and seized [R. 369], and with a desire on the part of the Government that a stipulation be entered in lieu of a motion to admit the books into evidence, which defense counsel declined. [R. 663.]

Right to be secure against such searches and seizures to have the evidence returned is upheld in

The Fourth and Fifth Amendments, U. S. Constitution;

Boyd v. United States, 116 U. S. 619, 29 L. Ed. 746, 6 S. Ct. 524;

Hale v. Henkel, 201 U. S. 43, 50 L. Ed. 652, 26 S. Ct. 370;

Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 64 L. Ed. 319, 40 S. Ct. 182, 24 A L. R. 1426;

Carroll v. United States, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 A. L. R. 790;

Go-Bart Importing Co. v. U. S., 282 U. S. 344, 75 L. Ed. 374, 51 S. Ct. 153;

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 652, 34 S. Ct. 341, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177;

Feldman v. U. S., 88 L. Ed. 1046;

Goldman v. U. S., 86 L. Ed. 1322;

Olmstead v. U. S., 277 U. S. 438, 72 L. Ed. 944.

In *Takahashi v. United States*, 143 F. (2d) 118, the Ninth Circuit Court held as follows:

> "But the authority to search cannot be confused with the authority to seize. It cannot be confused with the power to use seized articles in evidence. The Fourth Amendment prohibits unreasonable searches and seizures. The distinction has never been more carefully drawn than in the language used by Mr. Justice Miller in the concurring opinion in the case of Boyd v. United States, 116 U. S. 616, 641, 6 S. Ct. 524, 538, 29 L. Ed. 746. It is there said:
>
> 'The searches meant by the constitution were such as led to seizure when the search was successful.' And again: 'The things here forbidden are two: search and seizure.'"

I.

The District Court should have granted the motion to inspect the minutes of the Grand Jury because of the use of illegally secured evidence under the Fourth Amendment. (*U. S. v. Farrington*, 5 Fed. 343.) Had it disclosed illegally secured evidence, as the trial court assumed it might, then the motion to quash the indictment [R. 241] would have been appropriate. (*U. S. v. Robb*, 141 F. (2d) 45, 47.) If the indictment was based on illegally secured evidence it should have been quoted. (*U. S. v. Babb*, 141 F. (2d) 45.)

J.

The trial court erred in refusing to let Officer Myerson be called as a witness orally during the trial. [R. 380.] The right to have a hearing on the illegality of the evidence existed during the trial.

Gouled v. U. S., 65 L. Ed. 647;
McNabb v. U. S., 87 L. Ed. 579.

K.

The trial court erred in not striking the evidence illegally secured. [R. 369 *et seq.*] The motion to suppress the evidence may be made not only prior to trial, but may be renewed during the course of the trial.

In *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, the appellant petitioned the trial court prior to trial and again after the jury had been sworn, and before any evidence had been given, the defendant again urged his petition for the return of his property. Upon the introduction of such papers during the trial the defendant objected. The Supreme Court held that the application for the return of the papers prior to trial constituted a denial of the constitutional rights of the accused and that the trial court should have restored the letters to the accused. The court further said that in holding the property and permitting its use in the trial was prejudicial error, and held that "if these documents can thus be seized and held and used as evidence against a citizen accused of an offense, the protection of the 4th Amendment . . . is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

In *Gouled v. United States*, 65 L. Ed. 654, the court said:

> "The papers being of 'evidential value only,' and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. . . . and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seiz-

ure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

L.

For the foregoing reasons the court also erred in admitting into evidence Exhibits 34 to 45. [R. 663, 666.] Appellant vigorously objected under the Fourth and Fifth Amendments to the admission of these illegally seized books and records, and refused to waive the rights which he had protected. Under the ruling of the *Gouled* case it was error to admit these books and records into evidence.

It may be noted that the prosecution in the *Gouled* case was against Gouled, one Vaughan, an officer in the United States Army, and an attorney. The charge alleged defrauding the government on contracts for clothing and equipment in the last war. The court suppressed the evidence and answered a series of certified questions which, we think, are decisive in the case at bar.

M.

What we have said heretofore regarding the motions is equally applicable to our renewal of the grounds expressed on unlawful search and seizure on the motion for a new trial.

Weeks v. United States, 232 U. S. 392, 58 L. Ed. 655.

Go-Bart Importing Co. v. United States, 282 U. S. 374, 75 L. Ed. 344, said:

> ". . . Gouled v. United States, 256 U. S. 298, 307, 65 L. ed. 647, 651, 41 S. Ct. 261. The second clause declares, 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state in the Union. Agnello v. United States, 269 U. S. 20, 33, 70 L. ed. 145, 149, 51 A. L. R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. Boyd v. United States, 116 U. S. 616, 623, 29 L. ed. 746, 748, 6 S. Ct. 524; Weeks v. United States, 232 U. S. 389-392, 58 L. ed. 654, 655, L. R. A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177, *supra*."

As in the *Go-Bart* case, so here, there was a general, exploratory search, and as in that case, by pretension of right and threat of force, the investigators compelled the early inspection which they made and delivery of papers for search and seizure.

In the Circuit Court of Appeals the government admitted that the affidavits for the search warrants were insufficient, but contended that it had a right to inspect the defense

contractor's books and records and seize them without a proper search warrant.

When the motion to suppress the evidence was first made the government filed an affidavit of Hilton Byers in which he had given authority to the agents of the department of justice to inspect the books. [R. 194, 195.]

> "That at no time during said period did said Special [68] Agents of the Federal Bureau of Investigation make a search of said premises except upon two occasions when they appeared there with search warrants issued by the United States Commissioner in and for said District, and then and there they seized certain specifically designated books and records. That at all times during said period from on or about October 20, 1942, to and including the 1st day of December, 1942, all said books of account and records of Edward F. Zap pertaining to and under said contracts were within the custody of the United States Navy, pursuant to said contracts and the terms and provisions thereof, and said United States Navy refused and declined to permit any person whatsoever to remove any of said books of account and records, or either of them, without a warrant." [R. 195.]

The District Court denied the motion to suppress on the grounds urged by the government therein, and on its assertion that it relied solely on the search warrants for its seizure.

In the Circuit Court of Appeals the government conceded the warrants to have been based upon insufficient affidavits and without a showing of probable cause.

The government cannot rely upon a different ground than that acted upon by the trial court.

U. S. v. Bosoni, 57 F. (2d) 328.

II.

Where Congress Has by Statute Declared That Certain Agencies of the Government as Designated by the President of the United States May Inspect the Books and Records of War Contractors, Other Agencies Not so Designated May Not Inspect the Records or Seize Them for Any Purpose Whatsoever and May Not Seize Them Without a Proper Search Warrant or (Even With a Proper Search Warrant), as the Safety and Secrecy of the Matters Involved Show That This Construction Expresses the True Congressional Intent.

Congress authorized inspection of war contractor's records only by one of the agencies designated by the president. Title 50 App. 643 (First War Powers' Act) and Executive Order 9127. (See Appendix of Petition.)

It seems clear that this authority limits the right of inspection to the designated agencies and under the doctrine of *inclusio unis exclusio alterius* all others are necessarily excluded. The presidential order did not include the FBI. The Congressional purpose to keep matters confidential within the very departments and in fact only to the designated officers of the particular department having control of the contracts seems clear and sound. The Navy with its numerous auditors and inspectors did not need FBI auditors and they rightly protested against unauthorized inspections.

Unauthorized inspections by a collateral agency of the government might well open up secrets of the gravest

nature on a pretext of inspection. Thus, supposing that someone had reported a "war fraud" in the expenditure of huge sums of money (two billion dollars) for an "atomic bomb," and some FBI agents hearing of the same, or some ambitious investigators of the war fraud's unit, thinking they had made a big discovery, should decide to "inspect" the records of the defense plant. We respectfully submit that no authority existed for it, under the Executive Order 9127. The legal question is one of the greatest importance and should be decided by this court.

We believe that the statute and the authority pursuant thereto limiting the right of inspection, might equally be said to limit the right even of search and seizure, except upon executive order of the president or the particular head of an agency authorized by him to grant the authority. No such authority was asked for here, or granted.

In the instant case the contractor was experimenting with secrets of great importance, among which were the shortening of the takeoff of an airplane and its landing to enable it to do so in a much shorter distance than had previously been done from aircraft carriers.

FBI Agents Myerson and Sloane were therefore not permitted under statute to make any "inspection"—much less any search or seizure.

III.

The District Court Erred in Failing to Sustain the Demurrers to the Indictment and the Motion in Arrest of Judgment on the Ground That the Indictment Failed to Apprise the Court and Defendant of the Nature and Cause of the Accusation and Failed to State an Offense Against the Laws of the United States. [Assignment of Errors 1, 2, 3, 4, 6, 7, 10, 11, R. 755, 756.]

What the claim was is not specified.

The indictment further charged that Edward F. Zap and Lloyd Scott presented a claim "to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California." The defendant was entitled to know whether he, Zap, or Scott presented the same and to which Disbursing Officer it was presented, so that the defendants might present their defense.

The indictment further charged that said claim "falsely purported to be for expenses incurred by said defendants in paying William H. McAvoy for services falsely therein set forth to have been rendered by said McAvoy as a test pilot of aeronautical equipment pursuant to the aforementioned contract 83142." This allegation failed to set forth what expenses it was charged either defendant falsely purported to have paid to said McAvoy, or what services set forth were falsely claimed to have been rendered. (Nor was appellant in any way aided in this matter by a bill of particulars.)

Count V of the indictment is a pure conclusion of the pleader and fails to give the exact fact concealed or the purported false statement and representation which it was alleged was made to Hilton Byers. The court and appel-

lant was entitled to know the exact duties of Byers and the exact items for which William H. McAvoy was paid $2,375.00, and what the contract provisions were.

The charging part certainly fails to apprise the defendant of the nature and cause of the accusation of the indictment as to each count, as required by the Sixth Amendment to the Constitution of the United States.

In *United States v. Cruikshank*, 92 U. S. 558, the court said:

> "In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI, . . . : It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' 1 Arch. Cr. Pr. and Pl. 291 . . . . For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.
>
> "It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen.

The rule is further supplemented in the following cases:

United States v. Hess, 124 U. S. 483;

United States v. Carll, 105 U. S. 611;

Foster v. United States (9th Cir.), 253 Fed. 481.

In the present case the indictment alleges a claim without specifying what the claim was. It is a reasonable and fair assumption, and the record in this case shows that the contractor had thousands of claims against the Navy for work done. Here the claim is not identified in any way to the defendant. His records were in the custody of the government and it was impossible for him to tell or know what the claim was. He was entitled to know what the *claim* was and in what way it falsely purported to be for reimbursement for expenses, and what the alleged expenses were. The averments were pure conclusions of the pleader. They contained no detail which would inform the court in the first instance as to what the claim was and as to wherein it was alleged to have been false; second, to inform the defendant; and third, to be a bar to a second prosecution for the same or similar offenses.

The indictment further alleged that Edward F. Zap and Lloyd Scott presented the claim, and it was the defendant's right to know whether he or Lloyd Scott was the one referred to in the indictments in question.

It is the general rule in the courts of the United States that not only must the accused be informed with particularity, but also, where the charge involves a document, such as a forged instrument, claim or voucher, the defendant is entitled to have the pleadings set forth either the document or the substance thereof.

Count IV of the indictment is vague, indefinite and uncertain. This count fails to specify the claim which it is alleged was made upon the United States in violation of the statute.

Where an instrument is referred to, either to set forth the instrument in *haec verba* or give the substance of the instrument, in order to inform the accused of the nature and cause of the accusation, as required by the Sixth Amendment to the Constitution of the United States.

The charging part of the indictment in Count IV alleges that "on or about the 16th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did make and present a claim for $4,000 upon the United States Navy for payment by presenting same to the disbursing officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California."

If there was a claim for $4,000 made to the disbursing officer of the United States Navy the government had the claim before it at the time it drew the indictment, and could have photostated the same or had it copied into the indictment in *haec verba*. As a matter of fact, the evidence in the case itself did not produce *any claim* for $4,000.

There was also a demand for a bill of particulars asking that the claim be set forth [R. 113]. The defendant was entitled to have the exact claim which the government intended to rely on set forth in the indictment and to be informed of it by a bill of particulars so that he could be prepared to meet it.

To show the great confusion over the alleged claim referred to in Count IV, at the time of the argument on the motion for a new trial even government counsel was confused in the belief that there was a claim for $4,000 and admitted that he was in error, that the claim he was talking about was for a different amount, namely, one for $4,300. The jury also was confused, because it re-

quested to have the indictment sent to the jury room and the court had to re-read the indictment to the jury as the jury was in the dark as to what was charged. The defendant not only could not tell from the indictment what instrument or claim he was alleged to have falsely presented, but he also demanded a bill of particulars so that he might be apprised of what he had to meet. the court overruling the demurrer and refusing to grant the bill of particulars. This was serious prejudicial error.

In forgery cases and cases involving documents it has generally been required by federal courts to set forth the forged instrument or give the defendant the substance of it.

In *American Jurisprudence*, Vol. 27, p. 621 *et seq.* on Indictments and Information, it is said:

> "It has been said that this constitutional right is based upon the presumption of innocence and that it requires such definiteness and certainty in the charge in an indictment or information as will enable a presumptively innocent man to prepare for trial . . ." (Sec. 57.)
>
> **"Written or Printed Matter and Pictures.—It is the general rule, in the absence of statute, that an instrument referred to in an indictment must be set forth according to its tenor with particularity and certainty, or the omission to do so excused by proper averments, such as that it has been lost or destroyed, or that it had remained in the possession of the accused; according to some authorities, an exact copy of the writing must be set forth in the indictment."**

Here the written instrument—the claim, was not set forth either in the indictment nor was the defendant given a bill of particulars.

The defendant in a criminal case is presumed to be innocent; that presumption clothes him throughout the trial of the case. Under that presumption the court upon looking at the face of the indictment is entitled to know whether it does or does not charge a crime, and, if, under the facts alleged, the accused could be innocent, no crime is charged. (*People v. Schmitz*, 7 Cal. App. 330; *People v. Davenport*, 21 Cal. App. (2d) 292.) *U. S. v. Johnson*, 53 Fed. Sup.

Under the particular charge in this indictment is must be presumed that the claims were regular and proper unless the indictment itself charges a fact which show them to be otherwise. The government was in possession of this information. The court and defendant were entitled to it.

In *Keys v. United States*, 126 Fed. (2d) 181, 184, the court said:

> "At common law an indictment for sending a threatening letter, or for forgery or libel, was required to be set out in *haec verba*. Bradlaugh v. The Queen, L. R. 32, B. D. 618; and the federal courts have in some instances followed or repeated the rule. United States v. Noelke, C. C. N. Y., 1 F. 426, 433; Wilson v. United States, 2 Cir. 275 F. 307, 312."

See, also:

Bartel v. United States, 227 U. S. 427, 57 L. Ed. 583.

As said in *Harris v. United States*, 104 Fed. (2d) 41, where an indictment fails to set out the essential elements of a statutory offense, it is the duty of the court to set aside the judgment.

In that case the defendant was charged with making certain false entries in records of the Postoffice establishment knowing the same to be false with intent to mislead and defraud the Postoffice establishment. The count of the indictment charged the defendant with making a false "Statement of Mailing." There is an absence of any allegation identifying said "Statement of Mailing." The court held that such an indictment was insufficient.

It is respectfully submitted that an allegation of a false claim is equally as indefinite as a "Statement of Mailing" where the claim is not otherwise sufficiently described to identify it.

In the *Harris* case the court reversed the judgment even though the sufficiency of the count was not formally challenged by demurrer or motion to quash but only upon a motion for a directed verdict.

> "Proper identification of the paper forged, or of the record of the Postoffice Establishment at Lebanon, is an essential element of the crime defined by Section 189. This has been omitted from count four. It cannot be supplied by 'intendment or implication,' and the defect was not cured by the guilty verdict.
>
> "The judgment of the lower court is accordingly reversed."

In the case of *Fuller v. United States,* 110 Fed. (2d) 815 (Ninth Circuit), it was alleged that a false affidavit was filed in connection with a claim against the United States. The affidavit in this case was set out in full.

Likewise in *U. S. v. Gilliland,* 35 Fed. Supp. 181, the affidavit was set out in full.

Where a claim is known to the Government it is certain that there is no reason why it should not be set out so that the defendant could know what it is he is charged with having done.

No case ever cried louder for this to be done than the present case.

In *Fuller v. United States,* 110 Fed. (2d) 817 (9th Cir.), it was said:

> "Appellants moved for a bill of particulars, but there was no error in the denial of the motion. The offenses charged are described with great particularity in the indictment. The precise facts alleged to have been falsified are set out in the indictment and the affidavits themselves are incorporated in the various counts."

This was not done here.

See:

United States v. Cruickshank, 92 U. S. 542, 23 L. Ed. 588;

United States v. Hess, 124 U. S. 483, 32 L. Ed. 516;

Blitz v. United States, 153 U. S. 308, 38 L. Ed. 725;

United States v. Carll, 105 U. S. 611, 26 L. Ed. 725;

Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419;

United States v. Dowling, 278 Fed. 630 (D. C., S. D. Fla.);

Brenner v. United States, 287 Fed. 636 (C. C. A. 2d Cir.);

United States v. Green, 136 Fed. 618-659 (D. C., N. D. N. Y.);

Conrad v. United States, 127 Fed. 798 (C. C. A. 5th Cir.);

Salla v. United States, 104 Fed. 544 (C. C. A. 9th Cir.);

United States v. Bopp, 230 Fed. 723.

In *Hills v. United States*, 97 Fed. (2d) 713, it was held:

> "The first paragraph of the count attempts to charge in the language of the statute, but states only that appellant wilfully falsified 'a material matter.' The words 'a material fact' are omitted. Obviously, it is the falsification and concealment of facts leading to the sale, and not of the whole of the 'matter' of the purchase under the statute, in which the government is engaged, which constitutes the offense."

The District Court Should Have Sustained the Demurrer to the Indictment Because the Indictment Failed to Set Out the Applicable Portion of the Contracts, and No Bill of Particulars Was Ordered to Set Out the Applicable Portions of the Contracts.

Had the trial court ordered the Government to either amend the indictment to allege the applicable portion of the contracts, or furnish a bill of particulars, then the provision regarding the flight test and insurance would have had to have been set up.

It may be said that the charge in the indictment gives a false statement to the court, counsel and jury, in that it implies that the contract required payment to McAvoy for the flight test alone, whereas under the provisions of the contract it was specified: "(A) Chief test pilot's fee and insurance, $4,000.00." [R. 305.]

The indictment represents that the contract did not make such a provision, and in that respect Count IV and Count V are misleading.

Pettibone v. United States, 148 U. S. 195, 37 L. Ed. 419.

Counts IV and V Are Insufficient Upon General Doctrine.

Both counts, IV and V, are insufficient in the particulars above mentioned, not only upon the hyoptheses set forth above, but under the equally fundamental and more often applied principles announced in such decisions as:

Armour P. Co. v. United States, 209 U. S. 58, 83, 52 L. Ed. 681;

Keck v. United States, 172 U. S. 434, 43 L. Ed. 505;

Rosen v. United States, 161 U. S. 29, 49 L. Ed. 606;

Cochran v. United States, 157 U. S. 286, 290;

Bacheldor v. United States, 156 U. S. 426;

Potter v. United States, 155 U. S. 438;

Evans v. United States, 153 U. S. 584, 588;

Pettibone v. United States, 148 U. S. 197;

United States v. Hess, 124 U. S. 483, 31 L. Ed. 516;

United States v. Britton, 107 U. S. 655, 662;

United States v. Carll, 105 U. S. 611, 26 L. Ed. 1115;

United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819;

Foster v. United States, 253 Fed. 481;

Knauer v. United States, 237 Fed. 8;

Peters v. United States, 127 Fed. 127;

Re Greene, 52 Fed. 104.

Of the above cases the following involve alleged violation of the National Banking Act, which contains provisions very similar to those of the instant Act and which were dealt with in these decisions:

Cochran v. United States, 157 U. S. 286, 290;
Evans v. United States, 153 U. S. 584, 588;
United States v. Britton, 107 U. S. 655, 662;
Peters v. United States, 94 Fed. 127.

D.

Count IV of the instant indictment contains no direct averment that the figure filled in upon the blank check signed by William H. McAvoy did not represent the compensation which had been paid to him or was due for his services (expenses and insurance) as a test pilot. The only allegation from which such an inference could be drawn is that wherein it is said:

> "Defendants Edward F. Zap and Lloyd Scott well knew that said McAvoy had been paid approximately $2,375, and no more, for conducting said test flights and that no other or further sums had been incurred for and on account of said test flight expenses."

The pivotal fact in this whole particular description of the facts and acts of the defendants which, if true, would establish that they did "falsely state and represent" to Hilton Byers that $4,000 had been paid to McAvoy, is that McAvoy had not been paid $4,000, as indicated by the rubber stamp indorsed cancelled check and that $4,000

was not due for the flight test (and insurance). Every fact directly alleged in this charge might be true and no offense would have been committed. The truth of this proposition is so plain that it is reasonable to suppose that the pleader had some reason for omitting to clearly and definitely aver that McAvoy had only been paid approximately $2,375, and that $4,000 had not been paid for flight test including McAvoy and expenses and insurance.

Had such an averment been made it would have then been proper, and perhaps necessary, to have added that the defendants then and there well knew that McAvoy had been paid $2,375, and no more, and also to aver that the contract only called for this amount and no more, this of course the pleader could not do.

E.

The indictment was also bad on account of duplicity. Count V charges two distinct defenses, and the jury might have been divided so that six believed one act and six another, and yet there was no unanimity on the subject as a whole. (*Blitz v. United States*, 153 U. S. 308, 38 L. Ed. 725; *United States v. Melsi*, 118 Fed. 903; *United States v. Hess*, 124 U. S. 483, 81 L. Ed. 516; *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819; See particularly *United States v. Britton*, 107 U. S. 615; 27 L. Ed. 524; *United States v. Tello*, 6 Fed. (2d) 579; *Keck v. United States*, 172 U. S. 434, 437, 43 L. Ed. 505.)

Count V, was duplicitous because it charged two inconsistent things; concealment and making a false statement. One requires silence; the other expression.

It charges that the defendants covered up by trick, scheme and device a material fact, and it also charges that they did make and cause to be made a false and fraudulent statement and representation, etc. Each is a separate offense under the Act. (*Ex parte Shaffenourg*, 21 Fed. Case 12696.)

Under this duplicity part of the jury might have believed that appellant concealed and made no false statement and representation, and part might have believed he made a false representation but did not conceal. Therefore the demurrer on the ground of duplicity should have been sustained.

United States v. Morrison, 16 Fed. Supp. 934.

In the case of *People v. Werner*, 29 Cal. App. (2d) 126, the court held a conviction void where the intent was inconsistent.

Here, the allegations of the indictment are inconsistent, so that a juror might in one instance believe that the defendant concealed and in the other instance that he made a false and fraudulent statement. Hence six of the jurors might believe one thing and six another. An indictment which permits such a situation is duplicitous. (See *United States v. Morrison*, 16 Fed. Supp. 934; *Waters-Pierce Oil Co.*, 212 U. S. 86.)

IV.

The District Court Erred in Denying a Bill of Particulars. [Assignment of Errors 8, R. 756.]

The record consists of more than 770 pages. There were fifty-eight government exhibits, some consisting of many pages, introduced against the defendant. Several of these are of such nature that they might come within the description of a claim.

The appellant, therefore, stands in this unique position: That being jointly accused with Lieutenant Scott, he did not know until the prosecution rested, what acts were alleged to have been committed by him and what acts were claimed to have been committed by his co-defendant. There having been a long series of transactions between appellant and the government, extending over a period of years and arising under several different contracts out of each transaction, one or more claims each embracing several items having been presented to some officer, not always the same, it must be apparent that his situation so far as preparing his defense was concerned, was no different from what it would have been if this first count of the indictment had consisted of a single sentence alleging that he and his co-defendant had presented a false claim to an officer of the government within the period of limitations.

The defendant demanded a Bill of Particulars in which he demanded the exact and specific terms of the alleged false claim, the exact terms of the contracts, the details of the claim under contract 83142 and information as to what part is claimed to be false, and to whom the claims

were allegedly presented and their exact authority. He also demanded to know the exact false representation alleged and the respect in which the same is claimed to be false. His motion for a bill of particulars was denied.

The defendant was entitled to a bill of particulars for the many uncertainties and to give him the necessary information to prepare his defense.

The need for a bill of particulars is clearly shown by the manner in which the allegations were set forth in each count of the indictment.

Here, appellant was in the dark not only at the beginning of the case, but throughout the case, as to what the Government was referring to as a false bill, voucher, claim, certificate or affidavit. So was the jury necessarily at the close of the case. This shows the tremendous need for a bill of particulars in this case.

In Count IV again a false claim is alleged, but without setting out the claim.

In Count V it is again alleged that the defendants "did falsify, conceal and cover up by trick, scheme, and device, a material fact and make and cause to be made a false and fraudulent statement and representation in a matter within the jurisdiction of a department or agency of the United States . . . ." Again there is no showing as to what the fact was or what the representation and statement was, or wherein it was alleged to be false, or to whom it was presented.

A Bill of Particulars is the appropriate remedy where the indictment is general or indefinite.

Rosen v. U. S., 161 U. S. 29, 40;
Glasser v. U. S., 315 U. S. 60, 86 L. Ed. 680;
Baker v. U. S., 115 Fed. (2d) 533, 85 L. Ed. 1128;
U. S. v. Grossman, 55 Fed. (2d) 408;
Kager v. U. S., 46 Fed. (2d) 302;
Beck v. U. S., 33 Fed. (2d) 107.

Or where the indictment does not give accused sufficient knowledge to enable him to prepare for trial.

Braylon v. U. S., 74 Fed. (2d) 389-390;
Vedin v. U. S., 257 Fed. 550;
Morris v. U. S., 161 Fed. 672;
Rinker v. U. S., 151 Fed. 755, 759;

See also *Rimmerman v. U. S.*, 186 Fed. 307.

Also a Bill of Particulars should be granted where the language is such that the defendant is likely to be surprised. (*Singer v. U. S.*, 58 Fed. (2d) 74; *O'Neill v. U. S.*, 19 Fed. (2d) 322.)

Clearly the allegation that the expenses purported to be for conducting certain tests under the terms and provisions of said contracts, involves conclusions whether certain tests were or were not, *under the terms and provisions of said contracts*, might easily depend upon the interpretation given the contracts under consideration.

We think that the appellant was entitled to know definitely whether the government contended that he presented the claim or that it was presented by Scott in his behalf.

V.

The District Court Erred in Overruling the Plea in Abatement and the Obection to the Jury Being Composed Entirely of Men. [Assignment of Errors 9, R. 756.]

Title 28, section 411, United States Codes, provides:

> "Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

This section applies to the mode of obtaining the general panel of jurors, as well as to the method of impaneling them in a specific case on trial. (*Silsby v. Foote*, 14 How. (55 U. S., 219, 14 L. Ed. 395); *United States v. Collins*, Fed. Case. 14837; *Brewer v. Jacobs*, 22 Fed. 217; *Glasser v. United States*, 315 U. S. 60, 86 L. Ed. 680.)

Section 412 of Title 28 provides:

> "All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, *possessing the qualifications prescribed in the section last preceding*, which names shall have been placed therein by the clerk of such court . . ."
> (Italics ours.)

The record in this case shows that women were excluded from both the grand and petit juries and had been for several years preceding this case. Since this case

the method of selecting juries in Los Angeles County has changed, and both men and women are now on the panel of the grand and petit juries.

It need hardly be argued that women who are qualified to be Waves, Wacs, Spars and Marines, are qualified to be on juries, and their exclusion, to which objection was made in this case should have been sustained.

Glasser v. U. S., 86 L. Ed. 680.

VI.

The District Court Erred in Refusing to Order the Return to the Defendant of the Papers and Documents Which Commander Smith Had in His Custody so That He Could Prepare His Defense. [Assignment of Errors 19, R. 758.]

These papers were in the possession of the government, and Commander Smith expressed his willingness to return them to the defendant "upon the order of the court." Commander Smith was in court and offered to return these papers "upon orders of the court." The government counsel, not the Navy, resisted the demand. Upon this resistance Judge Yankwich held he was "without jurisdiction." It was only after the trial started, and the trial judge ordered the production of the papers that they were then produced. Application was duly made to the court but Judge Yankwich held that he had no jurisdiction in the matter, to which an exception was made [R. 32]. This was error and deprived the defendant of his right to get at the material papers necessary for his defense.

> "Certain safeguards are essential to criminal justice. The accused must have ample opportunity to meet the case of the prosecution. Adams v. U. S., 87 L. Ed. 212."

VII.

The District Court Erred in Its Procedure Relative to the Discharge of Juror No. 2, and in Holding the Hearing Outside of the Hearing of the Defendant and in Excusing Said Juror Without the Defendant's Consent. [Assignment of Errors 21, R. 758.]

After the jury had been impaneled the government moved to discharge juror No. 2, a Mr. Wiget, because it appeared that when he left the jury room he was observed by Murray Myerson, an F.B.I. agent, speaking to the defendant Scott in the hallway immediately outside the court room. According to Myerson, the juror approached Scott, put out his hand, and referred to a conversation he had with Scott about the sinking of some boat [R. 260-265].

A discussion, together with the testimony of the F.B.I. agent, was had at the bench outside of the presence of the defendants, and outside of their hearing. Counsel for this appellant at first objected to excusing the juror, but counsel for Scott agreed to excuse him, and counsel for appellant stipulated that the juror could be excused. This, however, was outside the hearing of the defendants and without their knowledge.

Thereafter the manner of excusing the juror was left entirely to the judge, who simply excused the juror as soon as counsel returned to their seats at the counsel table.

At no time did the defendant Zap know what had transpired at the bench.

While defendant Zap's counsel did agree to have the said juror excused and stipulated to the same, he feels

duty bound to present to this court for determination, the same as though some other counsel had taken over the appeal, (1) whether the court acted properly when it excused the juror without first asking and obtaining the express consent of the defendant Zap, and (2) whether the proceedings had at the bench outside the presence or hearing of Mr. Zap, and without his full knowledge—which matters arose unexpectedly while counsel were at the bench regarding other matters—deprived the defendant Zap of his fundamental right to be actually present at every stage of the proceedings and to actually hear everything that occurred especially in so important a matter as excusing a juror and selecting another one. It is respectfully submitted that both court and counsel erred in the proceedings had, unless counsel had the right to bind his client to the discharge of a juror after proceedings outside of his hearing and without his knowledge.

Under the authority of the cases of *Lewis v. United States*, 146 U. S. 370, 36 L. Ed. 1011, and *Patton v. United States*, 281 U. S. 276, 74 L. Ed. 855, the defendant Zap was not only entitled to hear everything that occurred with reference to the selection and discharge of a juror, but before a juror who had already been selected and passed could be discharged his express consent should have been secured.

The jurors had all been accepted by both sides after such examination as satisfied counsel of their impartiality. If any juror answered in response to any questions that he was unacquainted with both defendants and after-

wards thought he was acquainted with one, that juror was entitled to the presumption that he had innocently mistaken the fact as to his acquaintance. If any juror who had thus been accepted afterwards came to be under suspicion the defendant had a right to be personally apprised of that fact and to have those witnesses cross-examined by his counsel *after the communication to such counsel of all the knowledge concerning the matter which the defendant possessed.*

In *Lewis v. United States, supra,* the Supreme Court said:

> "A leading principle that pervades the entire law of criminal procedure is that after indictment found nothing should be done in the absence of the prisoner. While this rule has, at times, and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."

The court in that case cites numerous cases sustaining the proposition that the accused must be so present and that the record must affirmatively show his presence, including *Hopt v. Utah,* 110 U. S. 578, 28 L. Ed. 264, where it was said:

> "For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins."

And:

"We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well as to the relations which the accused owes to the people as to the end of human punishment. . . . The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

This case was approved in *Territory v. Day,* 2 Okl. 411, 37 Pac. 806; *State v. Mannion,* 19 Utah 511, 75 Am. St. Rep. 756, 57 Pac. 543, 45 L. R. A. 639.

Was the defendant "present" personally within the meaning of the above cases when the proceedings took place at the bench outside the hearing of the defendant and he did not know what was taking place or what had taken place any more than if he had been in New York or Washington. The discharge of Juror No. 2, Mr. Wiget, was erroneous without the full knowledge and express consent of Zap.

D. A. Form No. 71
Form approved by Comptroller General, U.S.
May 7, 1942

265.4
16-m

D. O. Voucher No. 36062
☒ Preliminary No. 40
☐ Monthly bill No.
(Mark X for kind of payment)

PUBLIC VOUCHER FOR COST PLUS CONTRACTS

11th Naval District
San Diego, California October 18 1942
(Place) (Date)

PAID BY
11th NAVAL DISTRICT
SAN DIEGO, CALIFORNIA
JAMES A. [illegible]
[illegible]

Appropriation 1711502.4 Aviation, Navy, 1941 (VI)
Title and account 15XB-(170) Property Accounting Office-Bu.S&A.
The United States, Dr. To Edward P. Zap
10976 Wilshire Blvd., Los Angeles, California

Contract No NOa 83142 Dated 22 March 1941 Requisition No. 1049 Date
For Work on a Cost-Plus-A-Fixed-Fee basis under contract.

Period			
	Labor		
	Material		
	Indirect charges		
October 1942	Other Direct Charges	4,300 00	
	Subtotal		4,300 00
	Fixed charges on labor		
	Manufacturing		
	Fixed profit		
	Other charges		
	Total		4,300 00
	Less [illegible]		
	Performance and [illegible]		
	Net amount		4,300 00

I hereby certify and solemnly swear that the above bill is correct and just and that payment therefor has not been received.

October 15 1942

Edward P. Zap

By Edward P. Zap
Title Individual Prop.

I hereby certify that the foregoing is the actual cost, and that the services have been performed or materials delivered, in accordance with the contract.

October 15 1942

G. A. Smith
Constr. (Insp.) Naval Aircraft

L. S. Sinof, Ensign (SC) USNR
(Inspector)

(NOT REQUIRED ON PRELIMINARY BILLS)

Navy Department, Washington, D. C., 19

We certify that the above services were performed or materials delivered as stated herein; that they were procured under the contract considered above; that they were necessary for the public service; and that the prices charged are just and reasonable and in accordance with the agreement.

Approved for $

Chief, Bureau of
Chief, Bureau of
Secretary of the Navy

GENERAL ACCOUNTING OFFICE
Comptroller General of the United States

Credited for payment in the sum of $

By

Paid by Check No. 185143, dated 19, on Treasurer of the United States, in favor of payee named above.

Current Voucher	Previously Vouchered	Total
$ 4,300.00	$ 367,449.87	$ 371,749.87

Edward F. Zap
Individual Proprietor

Edward F. Zap
Individual Prop.

VIII.

The Trial Court Erred in Failing to Direct the Verdict in This Case. [Assignment of Error 26.]

The charge in this case as to Count 4 is as follows:

> "On or about the 16th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did make and present *a claim* for $4,000 upon the United States Navy for payment by presenting same to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California. That said claim falsely purported to be *for expenses* incurred by said defendants in paying William H. McAvoy for services *falsely therein set forth* to have been rendered by said McAvoy as a test pilot of aeronautical equipment pursuant to the aforementioned contract 83142. That said claim was false in that the sum of money actually paid to said William H. McAvoy for said services was $2,375, and no more, and not $4,000, as therein set forth."

The claim is shown below photostated.

It was made by the Navy inspectors and presented to Zap for signature under the present wartime setup [R. 291].

We respectfully submit there is nothing on the claim that falsely or otherwise purports to be:

1. For *expenses* incurred by said *defendants*, in paying William H. McAvoy for services.

2. Falsely *set forth therein* to have been rendered by said McAvoy as a test pilot.

If there is anything on this claim which shows that it is for expenses incurred by William H. McAvoy, or solely for services rendered by William H. McAvoy, or that it is for services rendered by him as a test pilot with all additional expenses incident thereto, we fail to find it. If there is anything showing a claim for $4,000 upon the United States Navy, we have failed to find it. If there is anything to show that any claim was presented solely for expenses for McAvoy (as distinguished for flight test and all expenses) in the sum of $4,000, we have failed to find it.*

We respectfully submit that upon this ground alone the defendant was and is entitled to a directed verdict.*

As to Count 5 it is alleged that the defendants Zap and Scott did falsify and conceal and did cover up by trick,

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*The flight test fees, which this claim covered, included many things, airport hangars and hangar space, fuel and oil, the pilot's fees, all of his expenses to and from his home, all living expenses while away from home, insurance of various characters, consultation trips. [R. 305, 591.]

scheme, and device, a material fact and make and cause to be made a false statement as follows:

"On or about the 23rd day of September, 1942, defendants Edward F. Zap and Lloyd Scott did falsely *state* and *represent* to *Hilton Byers*, who was then and there the United States Navy Cost Inspector, that the sum of $4,000 had been paid to William H.

•McAvoy testified [R. 305]:

"I was insured at all times during this flight. If I may refer back to a previous job with Mr. Zap the year before I carried that insurance myself, and paid for it. This particular time, it amounted to considerably more, and Mr. Zap kindly said that he would take care of it.

All of the tests were originally planned to be run at Hughes Field, if that is the place you are speaking of, and due to the weather we could not proceed and we had to change our location. We started the flight tests at Hughes Field, and included in my arrangements with Mr. Zap, and as a customary procedure, I was to be paid my traveling expenses down here. And Mr. Zap took care of those, that is right. I was also to be paid my expenses back—all additional expenses involved. [80]

"My home is in Los Altos, and my place of business at Moffett Field. I came by airplane. I think in every instance that I came down I flew down, and flew back. And in addition to my expenses for the trip, the pilot's fees also include all living expenses while here. Mr. Zap took care of all those. That was over and above the $2,000 which I originally planned on—originally stated in my contract with him. That was not included in any check that I received. In other words, Mr. Zap paid those additionally to anything that I received myself. No itemized statement that I know of has ever been made on that, as far as I am concerned, but they were all taken care of.

"After I flew at Hughes Field a heavy fog came up and the conditions here were quite foggy, and so I had to go to Daggett, which is about a hundred miles away. It is at least [8] that, if not further than that. I went up there and all my expenses up there were taken care of. In addition to my expenses up there, my expenses going to Daggett were taken car of."

Champlin estimated insurance costs "round three or four thousand. It might have been two." [R. 487.]

McAvoy for acting as test pilot in conducting certain tests pursuant to said contract 83142 *and did present to said Cost Inspector in support of said false statement and representation a cancelled check for $4,000 endorsed by said William H. McAvoy.* The defendants had previously presented to said McAvoy a check in blank and requested said McAvoy to endorse the same. That said McAvoy did so endorse the same."

Nowhere in the record is there any evidence that the defendants, or either of them, falsely *stated*, or ever *stated* or *represented to Milton Byers* that the sum of *$4,000* had been paid to McAvoy for acting as a test pilot. Byers did not so testify. The gravamen of the charge of count V is that the check was presented to Byers. Nowhere in the record is there any evidence that a cancelled check for $4,000 endorsed by William H. McAvoy was ever presented to the said *Cost Inspector* (Byers), in support of said *false statement*.* Byers did not so testify. If there is any such evidence in the record we have failed to find it anywhere in the testimony of Hilton Byers who would be the person who would have to testify to that fact.

Zap never made any representations to Byers. The amount filled out on the check was filled out by Ethel

*The check, a personal check on Zap's personal account, was typed in on October 13, 1943, and endorsed with a rubber stamp and taken down to the bank by Ethel Boyle, bookkeeper, Oct. 13, 1943. Its perforation shows it was paid that date. If it be presumed that it remained at the bank until the end of the month of October Zap was in the East from October 18 to Nov. 5, 1943. There is nothing in the record that shows the check was seen by Byers or presented to any cost inspector, as alleged in the indictment. Byers does not state it was presented to him. Zap did not know the amount on the check. Did not direct the amount put in, did not endorse it. Did not show it to anyone.

Boyle without any knowledge of Zap and the books which were made up were kept by certified auditor Browne and Champlin [R. 535] without any knowledge on the part of Zap. Zap testified he never knew anything about the books, and Ethel Boyle and Champlin so confirmed this testimony. [R. 534, 657.]

It is respectfully submitted that for each of these reasons failure of proof of fact as alleged in the indictment an indictment must be proved substantially as laid.

United States v. Corlin, 44 Fed. Sup. 940.

B.

The verdict should have been directed because of variance between the pleadings and the proof. Specification of error IV. [Assignment of Error No. 27—R. 759.]

The only claim which the Government sought to prove here was a claim for $4,300. We moved for a directed verdict on the ground that the indictment charges an item of $4,000 whereas the claim is for $4,300. Also on the ground that the item as far as McAvoy is concerned varied from the terms and facts alleged in the indictment. [H. 719.]

There is no claim for $4,000. A claim for $4,300 is surely not one for $4,000. We think that the motion to direct the verdict on this ground alone also should have been granted.

C.

The court erred in failing to direct the verdict on the grounds of lack of any guilty knowledge on the part of Zap, an essential ingredient of the statute and charged in

the indictment. In this respect the case is very similar to *U. S. v. Kelley* (9th Cir.), 138 Fed. (2d) 823, wherein fraud was charged in an application for veteran's insurance. In that case the learned court said:

> "The answer to question 40 was not made by Kelley, but was made by Doctor Lenger."

In our case the check, Exhibit 7, a personal check on Zap's personal account which was introduced by the Government, was not filled out by Zap but by Ethel Boyle on directions of the certified public accountant Browne, without Zap's knowledge.*

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*Ethel Boyle testified as follows [R. 467-469]:

"*Cross-Examination*

By Mr. Lavine:

I stated that this check for $4,000 was made out—that the typewritten part of it was typed by me, that is, I typed in 'Pay Four Thousand Dollars, $4,000, to the order of [221]—that is my typing, 'William H. McAvoy.' And I typed in 'Four Thousand Dollars.' I typed in the entire check. At the time that the check was handed to me to the typing in, Mr Zap's written signature was on the check. I said that I got instructions from Mr. Browne as to how to fill in the check. Mr. Browne furnished me with a typewritten statement as to how the items of charges were to be made. I see here [221-a] Defendants' Exhibit W, a work sheet, written by Mr Browne. I know Mr. Browne's handwriting. A typewritten sheet of a similar character was furnished to me at the place of business. That typewritten sheet had '3-15, flight test,' and had over it 'Contract 83142, fixed fee basis.'

Now, at the time that the check was handed to me by Mr Browne, I don't recall that Mr. Zap was present. I don't think so. Mr. Zap was in and out. In fact, I had so little to do with Mr. Zap—all my instructions came from Mr. Browne and Mr. Champlin. I really don't recall Mr Zap being around at the time. I do know I went to Mr. Browne. I gave the blank check at first, and I had 'September 23, 1941,' typed on the blank check, as well as my '3-15' down in the voucher part. Then when this check was given to me to fill out I asked Mr Browne how much I should make it out for, and, well, I was told to make it out to McAvoy and how much I should put in.

The *Kelley* case further says:

> "It was not signed by Kelley, nor so far as the record shows was it based on information obtained from Kelley."

In the present case the check, while signed in blank by Zap, was not endorsed by Zap after it was signed but was endorsed by a rubber stamp and was based on information obtained from the certified public accountant, Thomas Cedric Browne.

The *Kelley* case further says:

> "There was no evidence that Kelley saw it or knew anything about it."

In the present case there is no evidence that Zap saw the check after it was filled in for the $4.000 amount, or knew anything about it.

And it was endorsed and the signature was on, as I recall it. But where Mr. Zap was I don't know. That is, it was endorsed on the back by Mr. McAvoy, and Mr. Zap's signature was on the face of the check; but that wasn't anything irregular. Quite often Mr. Zap left signed checks for me so I had my signed checks of Mr. Zap when he was away. Mr. Browne would tell me to whom they were made payable. He would always give me all these bills and I'd use my signed checks for the payment of these bills. My instruction from Mr. Browne was to follow his memorandum on this contract 83142. [222] And in preparing this check I followed that memorandum, and Mr. Browne's instructions to me. This rubber stamp on the back of the check, that was stamped by me. Mr. Zap didn't endorse this check on the back after I filled it out. I took this check to the bank. I made a deposit and went over specially with that check. To my knowledge, I don't think Mr. Zap ever did see it after I filled it out."

IX.

The Exoneration of Defendant Scott Entitled Zap to a Directed Verdict Also.

The entire case of the Government was tried on the theory of joint operation, or that the defendants were co-conspirators. The indictment charged the defendants jointly with each of the acts alleged. The evidence was presented on such a joint theory. Therefore, when the Government proceeded on this theory, and the court directed a verdict in favor of Scott, it should likewise have directed the verdict in favor of Zap.

The court in instructing the jury said:

> "The second paragraph deals with the defendant Lieutenant Commander Lloyd Scott. It is not necessary to read that because the court has dismissed Lieutenant Commander Scott: if I, in any part of the indictment, should read defendants, you will remember that it only applies to one."

Appellant argued to the trial court as follows:

> "In connection with this matter, your Honor, when this case started out it started out on the theory of a conspiracy between Scott and Zap. The Government's whole case proceeded under that evidentiary theory. The indictment alleged both of them jointly, and in connection with that matter the Government charged them 'Lloyd Scott and Edward F. Zap' and then proceeded under this evidentiary conspiracy theory. The evidence was presented through Champlin as to certain supposed conspiracy acts. Each of the counts was infected by that situation. We reached a point in the trial, your Honor, where there was, in fact, no proof as to Scott, and the Court then

dismissed Scott and determined to direct the verdict as to Scott.

"Now, what position did that leave Mr. Zap in, legally, as well as factually, your Honor? Legally it left him in the position of having been acquitted of a conspiracy as far as Scott is concerned, and in so far as the Government having proceeded on the theory of conspiracy in the entire case it left us in the position where we could not do anything else but leave it alone. The jury had all that evidence before it. . . . and I think the acquittal of one of the co-defendants under the circumstances entitled the other to the acquittal also on all of the counts.

"Where there are two co-defendants and they are tried on an evidentiary theory of conspiracy in the entire case, and two defendants only, as here, then if one of the defendants is discharged it entitles the other one to a discharge." [R. 733-735.]

It is well known that when only two persons are charged with a conspiracy the acquittal of one acquits the other. In civil law, where there are two joint tort feasors the release of one releases the other under the principle of retraxit. Here it was the contention of the Government that both men operated jointly. Perhaps the Government started out on this theory in the hope of prosecuting and convicting Scott, as well as Zap. Scott was shown to be innocent and there was no evidence that he did this, and that, and the other thing, as charged in the indictment, the verdict was directed in his favor. It is respectfully submitted that Zap, equally with Scott, was entitled to a directed verdict.

X.

The Court Erred in Altering the Indictment by His Instructions!

The indictment charged in Count I "that on or about the 23rd day of September, 1942, the defendants Edward Zap AND Lloyd Scott did present to the Disbursing Officer, Bureau of Supplies and Accounts," etc.

In Count IV the charging part of the indictment sets forth "that on or about the 16th day of October, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, within the jurisdiction of this Court and within the Southern District of California, Central Division, defendants Edward F. Zap *and Lloyd Scott* did unlawfully, . . . make and present, etc., charging Zap and Scott jointly throughout.

In Count V, paragraph 22, it is charged "that on or about the 23rd day of September, 1942, defendants Edward F. Zap *and Lloyd Scott* did falsely state and represent," etc.

The court erred in instructing the jury to disregard that portion of the indictment relating to the defendant Scott.

The court in charging the jury said:

> "The second paragraph deals with the defendant Lieutenant Commander Lloyd Scott. It is not necessary to read that because the Court has dismissed Lieutenant Commander Scott; and if I in any part of the indictment should read 'Defendants,' you will remember that it only applies to one." [R. 669.]

On page 670 of the record the court said to the jury:

> "I will read it as it is written and then you will omit the defendant Scott."

The instructions of the court altered the indictment in violation of the constitutional provisions relating to the return of indictments as construed in *Ex parte Bain*, 120 U. S. 1, and *Edgerton v. U. S.*, 143 Fed. (2d) 697.

In the case at bar the defendants were both charged jointly. The evidence was presented on that theory throughout the case. The trial court told the jury to ignore the reference to Lloyd Scott. It is true that the court had directed the verdict as far as Scott was concerned, but this gave the court no authority to omit a phrase in the indictment. By doing so it was in effect trying the defendant on a charge not found by the grand jury, which is contrary to the principles enunciated in *Edgerton v. United States*, 143 Fed. (2d) 697. The withdrawal of the words "and Lloyd Scott" against Zap, and was, as in the *Edgerton* case (143 Fed. (2d) 697), a stressing of the charge against Zap. That the subject-matter was very confusing to the jury is shown by the fact that the jury itself asked for a copy of the indictment [R. 720] and also a copy of the instructions of the judge [R. 720]. Neither was furnished to the jury although Count I was reread to the jury and the jurors were promised that the instructions would be typewritten and sent to them.

Even though the court directed the verdict as to Scott, it could not remove Scott's name from the indictment returned by the Grand Jury, by an instruction, which told the trial jury that the indictment did not mean what it said, namely "Edward F. Zap and Lloyd Scott," etc.

XI.

The Court Below Failed to Instruct the Jury on the Statute and Law Applicable to the Case and the Decision of This Court Is Therefore Implicitly in Conflict With the Case of Corson v. U. S., 147 Fed. (2d) 439, and With Screws v. U. S. (1945), 89 L. Ed. 1029.

The trial court below gave no specific instructions to the jury on the statute which the accused was alleged to have violated as to Counts 4 and 5.

There was no assignment of error, or specification of error as to the failure of the trial court to give instructions on the statute involved. There were assignments of error made as to the refusal to give certain instructions relating to the definition and explanation of a claim within the meaning of the statute.

The case of *Corson v. U. S.*, 147 Fed. (2d) 439, holds that the failure to give such instructions is reversible error. The United States Supreme Court has decided the case of *Screws v. United States*, L. Ed. Adv. Opinions, Vol. 89, p. 1029.

The court held in the *Screws* case that where the instruction related directly to the case under dispute and was necessary for the determination of the only issue involved that even without an assignment of error it was necessary in the interest of justice and fairness to reverse the case. The court said:

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See Johnson v. United States, 318 U. S. 189, 200, 87 L. ed. 704, 714, 63 S. Ct. 549. But there are exceptions to that

rule. United States v. Atkinson, 297 U. S. 157, 160, 80 L. ed. 555, 557, 56 S. Ct. 391; Clyatt v. United States, 197 U. S. 207, 221, 222, 49 L. ed. 726, 731, 732, 25 S. Ct. 429. **And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilty, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."** (Blackface ours.)

Screws v. United States L. Ed. Adv. Opinions, Vol. 89, p. 1029, at 1039.

In the *Zap* case no instructions were given on the statute involved.

The court in *U. S. v. Bittinger*, 24 Fed. Cases, 1150 (Case No. 14,599), said in charging the jury:

"The indictment charges the defendant with having made false claims against the United States, knowing them to be false, fictitious, and fraudulent. Section 5438 of the United States statutes, under which the indictment is drawn, provides: 'Every person who makes or causes to be made or presents or causes to be presented for payment or approval . . . any claim upon or against the government of the United States, or any department thereof, knowing such claim to be false, fictitious or fraudulent, shall be imprisoned,' etc. By making a claim, as defined in this statute, is meant the asking or demanding on part of the defendant of the government payment for services. The term 'false,' used, means 'unfounded' or 'unjust'; by 'fictitious' is meant 'not

real'; by 'fraudulent,' wrong or 'deceitful.' These terms have no special legal signification in their use in this statute, but are to be taken by you in their ordinary and well-understood sense. The language of the statute and indictment, is, 'knowing such claim to be false, fictitious and fraudulent.' By the word 'knowing,' as here used, is meant the having a certain and clear perception of the falsity of the claim made. The object of the statute is to prohibit and punish the drawing of money from the treasury of the United States without having rendered legal and recognized equivalent."

In connection with the matter of the instructions the jury necessarily was confused as to what constituted a claim and could very easily have mistaken the certificate on page 5 of Exhibit 19 as a claim. Actually page 5 of Exhibit 19 could not be a claim, yet the jury without definition of what did or did not constitute a claim could very easily have misunderstood the meaning and purport of the statute since the jury had no instructions.

In *People v. Hecker*, 109 Cal. 451, the court said:

"The absence of instructions upon these questions of law left the jury without rudder or compass. The true rule for measuring the acts of the parties not having been given them, each was at liberty to set up his own independent standard and approve or condemn in accordance with it."

In *People v. Putman*, 20 Cal. (2d) 890, the court said:

"It is encumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. (People v. Warren, 16 Cal. (2d) 103,

104 Pac. (2d) 1024; People v. Scofield, 203 Cal. 703, 265 Pac. 914; People v. Nudo, 38 Cal. App. (2d) 381, 101 P. (2d) 162; People v. Curren, 24 Cal. App. (2d) 673, 75 Pac. (2d) 1090; People v. Best, 13 Cal. App. (2d) 606, 57 P. (2d) 168.

"An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. (People v. Warren, *supra*, People v. Tapia, 131 Cal. 647, 63 Pac. 1001; People v. Heddens, 12 Cal. App. (2d) 245, 55 P. (2d) 230.")

In *Bridgeman v. U. S.*, 140 Fed. 577, 592 (C. C. A. Ninth Circuit, 1905), the trial court gave a very full instruction, quoting the statute to the jury.[1] In the present case no such instruction was given and we respectfully submit that this court should reverse the case for this reason alone.[2]

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[1]In the *Bridgeman* case the court gave the following instruction:

"The statute of the United States under which the defendant is indicted reads as follows: 'Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, . . . every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand, nor more than five thousand dollars.' (U. S. Comp. St. 1901, p. 3674.)"

Bridgeman v. U. S., 140 Fed. 577, 592.

[2]It will be noted that in the subsequent case of *U. S. v. Chaplin* the same trial judge gave the statutory definition. 54 F. S. 682.

It will be seen by an examination of the record in this case that after the jury retired the jury was confused. The trial court had, instead of giving instructions on the statute involved, merely read the counts of the indictment to the jury. [R. 668.] The court after reading the indictment and telling the jury to omit the defendant Scott and not to consider him, even though his name was mentioned in the indictment, then proceeded to give the jury general instructions on their duties as jurors. But nowhere did the court define for the jury the statute that was applicable to Counts 4 and 5 or explain the meaning of the words in the statute. After the jury had retired and had been out slightly more than an hour, it sent a message to the court that it would like to get a copy of the indictment and the instructions of the judge to the jury. [R. 720.] A discussion followed in which defense counsel took exception to sending the indictment to the jury room but asked that the instructions be written up and sent. No instructions were ever sent to the jury room. The point we make is, the jury showed almost at the outset its confusion over the indictment and over the instructions. It was, of course, confusing since the jury was never instructed on the statute which the defendant was being tried and did not know the meaning of the words in the statute.

XII.

A.

The provisions of Section 80 make certain acts a violation of the statute. The trial court read the Indictment, but not the statute, and nowhere in the general charge is the statute given to the jury, nor is there a definition of the offense. We think this omission by the trial court is fatal error in this case, for without it the jury had no mark or measure to guide it in determining whether the defendant had violated the law.

Screws v. United States, 89 L. Ed. 1029.

The case of *Corson v. U. S.*, 147 Fed. (2d) 439, holds that the failure to give such instructions is reversible error. This court has decided the case of *Screws v. U. S.*, 89 L. Ed. 1029.

B.

The District Court Erred in Instructions Given and Refused.

1. The District Court erred in giving the following instruction:

> "You are instructed that the word 'willful' is used in the statute in this case and means a thing done without ground for believing it to be lawful, or *conduct marked by careless disregard as to whether or not the thing done is lawful.*"

Appellant objected vigorously to the instruction. He pointed out:

> "Careless disregard of truth, even in a perjury case, is not such an element as to make the offense wilful." [R. 710.]

The court overruled the objection, to which an exception was taken.

The court based its ruling on *United States v. Murdock*, 290 U. S. 289. That case, however, holds that the definition of the word "Willful" must be in relation to the particular type of offense alleged, and said:

> "Aid in arriving at the meaning of the word 'willfully' may be afforded by the context in which it is used (United States v. Sioux City Stock Yards Co. (C. C.), 162 Fed. 556, 562), and we think in the present instance the other omissions which the statute denounces in the same sentence only if willful, aid in ascertaining the meaning as respects the offense here charged."

Examined in the light of the statute which uses the word knowingly along with wilful the meaning of the word "wilful" as applied in section 80 we think is well expressed, that it denotes an act which is intentional, as distinguished from accident, but when used in a criminal statute it generally means an act done with a bad purpose.

There are cases where careless disregard would make a person liable, such as, for instance, in negligent homicide, or a case involving gross neglect of children, etc. However, under Title 18, section 80, the law is clear that a specific intent to do the act knowingly and wilfully and not a "careless disregard" of filing a false claim constitutes the gravamen of the offense. The instruction is therefore contrary to the statute.

Under the instruction of the court the jury could very properly convict the appellant for carelessness in the acts of his employees, or for failing personally to check items of account. The statute was not designed to punish such

acts, but to punish the deliberate "knowing and wilful" filing of a false claim with evil intent and purpose as a positive act, or the wilful making of a false statement as a positive act, or a wilful trick, scheme or device as a positive act.

In perjury cases which involve falsity of a statement to a court the law has been stated in *People v. Von Tiedeman*, 120 Cal. 137, quoting from Bishop's New Criminal Law, section 1048, as follows:

> "'Perjury cannot be willful where the oath is according to the belief and conviction of the witness as to its truth; reckless disregard of truth by a witness who has no belief that he is swearing falsely is not perjury, though his testimony is in fact false, and he would have made it true if he had used caution.'"

But guilty knowledge is made a specific part of Title 18, section 80, and the instruction flies in the face of that section.

This section not only requires allegation of knowledge and wilfulness, but proof thereof.

But "conduct marked by careless disregard as to whether the thing done is lawful" is lack of knowledge through carelessness as against the clear requirements of the statute that one is only guilty who makes or presents a claim "knowing such claim to be *false, fictitious or fraudulent*," or who shall "*knowingly and wilfully*" make or cause to be made a false or fraudulent statement or representation, etc.

This Court has fully discussed the meaning of the word "willful" in the recent case of *Screws v. U. S.*, 89 L. Ed. 1029. As applied to the present case and the

present statute, it is respectfully submitted that the trial court erred in instructing the jury.

2. The court erred in giving the jury the following instruction:

> "The defendant has offered himself as a witness and has testified in the case. Having done so you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. *It is proper to consider all of the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and fears, and what he has to gain or lose as a result of your verdict.*"

We have italicized the portion of this instruction which we deem to be erroneous and prejudicial. That portion adds nothing to the principle of law in the remaining portion. It cannot have been given for any other purpose than to discredit the defendant in the eyes of the jurors. The giving of such an instruction has frequently been condemned by the courts. (*Hicks v. U. S.*, 150 U. S. 442; *Allison v. U. S.*, 160 U. S. 203; *Williams v. U. S.* (9th Cir.), 93 F. (2d) 694; *People v. Maughs*, 149 Cal. 253, 263; *People v. Van Ewan*, 111 Cal. 144; *People v. Winters*, 125 Cal. 329.)

In *Williams v. U. S.*, 93 Fed. (2d) 694, the court said:

> "In the instant case, the lower court already had instructed the jury that it would be proper to consider 'the interest which such defendant may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your verdict.' The

propriety of even such an instruction has been doubted by the Supreme Court. In Hicks v. United States, 150 U. S. 442, 452, 14 S. Ct. 144, 147, 37 L. Ed. 1137, that tribunal said:

'It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and perhaps a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that "the person charged shall, at his own request, but not otherwise, be a competent witness." The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law.

'See, also, Allison v. United States, 160 U. S. 203, 207, 208, 16 S. Ct. 252, 40 L. Ed. 395.

'However that may be, it was clearly reversible error for the learned District Judge, after already having given the general instruction as to the defendant's interest in the case, to refer to it again in connection with the comparison with Cassidy's interest therein. As was said by Mr. Chief Justice Hughes in Quercia v. United States, *supra*, 289 U. S. 466, at page 470, 53 S. St. 698, 699, 77 L. Ed. 1321, "It is important that hostile comment of the

judge should not render vain the privilege of the accused to testify in his own behalf.

'The closing language of the opinion in Hunter v. United States, *supra*, 62 F. 2d 217, at page 220, is applicable to the lower court's activities in the instant case, both with respect to the examination of witnesses and the instructions to the jury.

'That the district judge did not intend to be unfair is beside the question. The case was tried in such a way that the jury, in considering as a whole the judge's questions and charge, might well have reached the conclusion that he was not impartial, but was insisting upon a conviction. It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial.' "

In *People v. Maughs*, 149 Cal. 253, the Supreme Court considers itself bound by the decisions in the earlier case of *People v. Cronin*, 34 Cal. 191, in which such an instruction was given. But in *People v. Maughs*, after citing the more recent cases in which such instructions had been criticized, the court said:

"And after all this admonition, after all these cautions, the conclusion is forced upon us that when a trial judge does give this instruction to a jury it can be with no other purpose than to throw his judicial weight into the scales against the defendant on trial before his court. For this reason therefore, we think the time has come to say that in all future cases which shall arise, and where, after this warning, this instruction shall be given, this court will

hold the giving of it to be so prejudicial to the rights of a defendant, secured to him by our constitution and laws, as to call for the reversal of any judgment which may be rendered against him."

In *People v. Boren*, 139 Cal. 210, 215, the court said:

"We again feel constrained to say, as was said in People v. Van Ewan, that it is difficult to logically attribute the giving of any instruction whatever on the subject of defendant's testimony to anything else than a purpose to expressly disparage a witness before a jury."

3. The trial court erred in refusing to give defendant's proposed instruction No. 19, as follows:

"You are instructed that by making a claim as defined in the statute, is meant the asking or demanding on the part of the defendant from the Government of payment for services. It is not the preliminary request for audit or inspection and approval of the items that constitutes the making of a claim, but it is the actual claim itself after the same has been submitted for audit and approval and submitted to the Navy Department for payment, that constitutes the claim within the meaning of the statute.

"United States v. Bittinger, 24 Fed. Cas. No. 14,599." [R. 703.]

4. The defendant was entitled to this instruction so that the jury would know what a claim was within the meaning of Count IV of the indictment.

Lieutenant Minor testified claims for fixed-price items were prepared as follows:

"Mr. Zap, I believe, would be required to prepare an invoice, itemizing the particular item in question, stating that the job had been completed, and forward that claim to the Bureau of Supplies and Accounts in Washington via the Inspector of Naval Aircraft; the inspector would endorse the invoice or the letter, as the case may be, indicating therein if the contractor's claim as to the completion and the acceptability of the item was correct; and on the basis of the inspector's endorsement the Bureau would issue a check in payment of the item. *That particular voucher would not go through my office.* Under contract 83142 Mr. Zap would secure reimbursement under a cost plus fixed fee item.

"As he accumulated costs according to the particular contract, he would notify the cost inspector and request that the charges be audited and approved and the necessary vouchers prepared. After our office had conducted a preliminary audit and reviewed the items, the voucher would then be prepared, forwarded to Mr. Zap for his signature, then after being signed by the cost inspector would be forwarded to the disbursing officer in San Diego, who would prepare the check. The inspector I mean is the Inspector of Naval Aircraft. The documents underlying the voucher would generally be approved by the resident inspector. . . ." [R. 290, 291.]

XIII.

The Trial Court Erred in Refusing to Arrest Judgment.

Motions in arrest of judgment for defects in the indictment and procedure denied and exceptions noted. This was error.

Blitz v. U. S., 153 U. S. 308;

U. S. v. Simmons, 96 U. S. 361, 24 L. Ed. 819;

Kellerman v. U. S., 295 Fed. 796;

McKenna v. U. S., 127 Fed. 88;

U. S. v. Ford, 34 Fed. 26;

U. S. v. McGuire, 64 Fed. (2d) 485.

XIV.

In the Circuit Court of Appeals, the Appellant Filed His Brief, Together With a Statement of Jurisdiction on Appeal, Which Was Printed as a Separate Document and Copies of Which Have Been Furnished to This Court. Commencing on Page 7 of the Jurisdictional Statement, to and Including Page 22, Under the Heading "C," the Appellant Presents Forty-one Questions Raised by the Appeal.

The Circuit Court of Appeals affirmed the judgment without opinion upon the merits, on the ground that Rule 20 of its rules had not been complied with, in that errors assigned "but not specified may be deemed waived." However, there was not only no waiver of the assigned errors, but they were set out in our opening brief and in our statement on jurisdiction on the questions presented by this appeal.

Neither the respondent nor the Court was in any way deprived of full notice, but on the contrary, the Government itself set out in its brief "twelve basic challenges."*

It will thus be seen by an examination of the brief, wherein we set out, for instance under point I, the errors relied on under motion to suppress the evidence, which

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*"It appears from appellant's Brief that he relies upon twelve basic challenges upon which the Government's position is as follows:

I. Appellant's constitutional rights were not prejudiced by the inspection, audit and seizure of certain of his records, and the subsequent use thereof in evidence.

II. Counts IV and V of the Indictment are legally sufficient.

III. Appellant's motion for a bill of particulars was properly denied.

IV. The absence of women from the grand jury panel does not require that the conviction be reversed.

V. The District Court correctly refused to order the return to the defendant of papers and documents which Commander Smith of the Navy Department had in his custody.

VI. The District Court did not err in its procedure relative to the discharge of juror No. 2.

VII. The dismissal of the appellant on Count VI did not constitute an acquittal on Counts IV and V.

VIII. The District Court properly refused to direct a verdict for defendant on counts IV and V.

IX. The District Court did not alter the Indictment by its instructions.

X. The District Court's action in permitting Government counsel to refresh the recollection of a witness by the use of the transcript of his testimony before the grand jury and in refusing defense counsel the right to examine the grand jury transcript was proper.

XI. The District Court did not err in instructions given and refused.

XII. The District Court properly denied the motion in arrest of judgment wherein appellant charged that prejudicial error appeared on the face of the record and that the record failed to show facts essential to the verdict."

errors are again specifically set out before this Honorable Court. We respectfully submit that the purpose of assignments of errors and specifications of those relied upon is to apprise opposing counsel of what it has to meet and the Court on the questions that are being considered.

Opposing counsel and the court were fully apprised. The Court itself gave special permission to file a brief of 188 pages, and the Government's reply brief took 86 pages. It is respectfully submitted that there was substantial compliance within the rules of court of both assignments of errors and specifications of errors.

Lonergan v. U. S., 33, 34, 82 L. Ed. 630.

This court in the exercise of its supervisory powers over criminal procedure should grant this petition.

XV.

The Circuit Court Erred in Not Remanding the Case for the Taking of Testimony and Hearing on a Motion for a New Trial Because of a Forgery of a Document Presented in Evidence Against Petitioner.

Just before the close of the trial, petitioner's attention was first called to a document which was numbered page 5 of Exhibit 19. The document was on stress paper, the kind the petitioner used in making reports of a technical nature to the Navy Department. [R. 644, 645, 646.] The petitioner recognized his signature on the paper, but not the data above his signature. He explained that when he goes on a trip, he signs ahead of time for the Stress Department to file its reports and send its reports back to Washington, but why the document was there or how

or whether it ever got to the Navy Department was something the petitioner did not understand.

He was the next to the last witness, and only one other witness, a very short witness, followed him. The case thereafter was submitted to the jury.

The petitioner, immediately after the trial, caused a further investigation and examination to be made of the document by Lawrence Buys, an examiner of Government documents, formerly connected with the Federal Bureau of Investigation, and Buys gave his opinion that the document was a forgery, that the material above Zap's signature was typed in after he had signed his name on the paper.

Petitioner, on July 6, 1943, made a motion before the United States Circuit Court of Appeals to remand the case, pursuant to Rule 2, Subdivision 3, of the Rules of Criminal Procedure, for consideration of a motion for a new trial because of a conviction based upon a forged and counterfeit document. The Circuit Court of Appeals denied the motion without opinion. However, a member of the court, during the oral argument, expressed himself as of the view that discovery of a forgery was not newly-discovered evidence within the meaning of the rule. Exception was noted to the Circuit Court's ruling as soon as it was received.

We respectfully submit that the Circuit Court should have remanded the case to the trial court, as forgery is a species of perjury, which fatally infects any criminal trial where it occurs, nd the widest latitude should be allowed in preventing any conviction based upon perjured or forged testimony.

The Government, in offering this document to the court or jury, vouched for it as apparently genuine. *U. S. v.*

Corlin, 144 Fed. Supp. 940, 945. But if it was a fabrication it should be grounds for reversal.

The courts of the United States have been uniform in holding that no conviction should rest upon fabricated testimony.

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791

The use of forged documents in a criminal case to secure a conviction would offend the fundamental principles of justice, and would be contrary to fair trial. *Lisenba v. California*, 314 U. S. 219, 236, 237. We submit, therefore, that the defendant should have the right to establish these facts. It is respectfully submitted that the proper course to pursue under such circumstances is to permit a retrial on this question which reaches the very foundation of the conviction as to Counts 4 and 5.

Where circumstances appear subsequent to conviction that bear on validity of judgment, Circuit Court may remand cause to District Court to pass upon motion for a new trial.

Hamel v. U. S., 135 Fed. (2d) 969;

Hawkins v. U. S., 90 Fed. (2d) 551; certiorari denied, 302 U. S. 733.

Conclusion.

For each of the reasons set forth in this petition, it is respectfully prayed that this Honorable Court grant certiorari.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioner